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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CARL ARNUSH, Plaintiff and Appellant, v. REX L. RHOTEN et al., Defendants and Respondents.	B207756 (Los Angeles County Super. Ct. No. BC349659)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jerry K. Fields, Judge. Reversed and remanded.

Law Offices of Ira N. Katz and Ira N. Katz for Plaintiff and Appellant.

Herzfeld & Rubin, Michael A. Zuk, Stephanie L. Rockey and Daniel H. Abrahamian for Defendant and Respondent Rex L. Rhoten.

Taylor & Blessey and Barbara M. Reardon for Defendant and Respondent Carl Lauryssen.

Patterson, Ritner, Lockwood & Jurich and Christie O. Beard for Defendant and Respondent J. Patrick Johnson.

Pivo, Halbreich, Martin, Wilson & Amo, Kenneth R. Pivo and Myra A. Firth for Defendant and Respondent Cedars-Sinai Medical Center.

Carl Arnush appeals from the judgment entered after the trial court granted summary judgment in favor of Cedars-Sinai Medical Center (Cedars) and Drs. Rex L. Rhoten, Carl Lauryssen and J. Patrick Johnson in this action for professional negligence and failure to obtain informed consent. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Arnush's Spinal Surgeries; the Complaint*

On June 21, 2004 Arnush was admitted to Cedars for spinal surgery to treat his degenerative disk disease and idiopathic lumbar scoliosis. Dr. Rhoten performed the first stage of the surgery on June 21, 2004 and the second stage on June 24, 2004. The surgery included an "L2-3, L3-4 and L4-5 anterior lumbar interbody fusion" and an "L1-L5 posterior spinal fusion."

According to Arnush, who remained hospitalized due to post-surgery complications including development of a seroma in his left leg,[1] he fell on July 10, 2004 while attempting to walk to the bathroom after nurses had failed for 10 minutes to respond to his calls for assistance. As a result of the fall, hardware placed by Dr. Rhoten at the L1 and L2 vertebral levels became dislodged. On July 12, 2004 Rhoten performed a third surgery to replace the hardware.

Arnush was discharged from Cedars by Dr. Rhoten on July 16, 2004; however, he was admitted to Cedar's emergency department two days later complaining of high fever and pain. Abscess or other infection was suspected, and Arnush was given antibiotics. On July 30, 2004 Dr. Lauryssen performed a neurosurgical consultation, after a referral by Dr. Rhoten, because of Arnush's continued complaints of pain. Dr. Lauryssen was unable to conclusively identify the source of Arnush's pain but suggested it could be due to infection, notwithstanding Arnush's temperature had stabilized and he was taking antibiotics; Dr. Lauryssen recommended Arnush be treated with steroids, botox injections and facet blocks.

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1 A seroma is a pocket of serous fluid that sometimes develops in the body after surgery.

On August 12, 2004 an MRI was taken of Arnush's lumbar spine, and it indicated the apparent failure of the fusion at L1 and L2 with progressive deformity. On August 17, 2004 a fourth surgery was performed by Dr. Lauryssen, with assistance by Dr. Johnson, including removal and replacement of the hardware from vertebral levels L1 to L5 that had been placed by Dr. Rhoten and extension of that hardware to T11 and T12, and cleaning of the infection at L1 to L5 that had developed on both sides of Arnush's spine. Arnush was discharged from the hospital on September 10, 2004.

According to Arnush, his recovery was poor; he could not straighten his back and continued to experience significant pain. In January 2005 Arnush was told he could begin physical therapy. Prior to commencement of therapy he was examined at the Spine Institute at St. John's Health Center, and it was discovered osteomyelitis (a bone infection) had set in and some of the hardware in his back had failed. In October 2005 Arnush underwent a fifth surgery by Dr. Rick Delamarter, who "performed an L5 to S1 anterior diskectomy and fusion with instrumentation, followed by an L5 to S1 posterior decompression and fusion with instrumentation, followed by a T11 through S1 hardware removal and exploration fusion." Dr. Delamarter "noted a loose screw in the left T11 region and that the rod had completely dislodged from the pedicle screw."

On March 27, 2006 Arnush filed a complaint alleging claims for professional negligence against Cedars, Dr. Rhoten, Dr. Johnson and Dr. Lauryssen and failure to obtain informed consent against the three doctors.[2] Arnush alleged he suffered extensive pain and was required to undergo several medical proceedings to "remedy the damages caused by . . . infection and the disrepair [it] caused to the hardware fusion in his back."

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2 The complaint also asserted claims against Dr. David Cossman, who had performed a portion of Arnush's fourth back surgery; Dr. Cossman was subsequently dismissed from the action.

2. *The Trial Court's Orders Granting Summary Judgment in Favor of Defendants*

Defendants moved for summary judgment, arguing, with support by expert declarations, their performance did not fall below the standard of care or cause Arnush's injuries, if any.[3] In opposition Arnush primarily argued defendants' experts lacked personal knowledge of the facts and thus their opinions were impermissibly based upon hearsay. Additionally, Arnush served Cedars, Johnson and Lauryssen with an expert declaration from Dr. Brent Pratley, attached as an "addendum to declaration" of Arnush's counsel, stating defendants had failed to meet the standard of care causing injury to Arnush. Dr. Pratley's declaration, however, was not filed with the court until two days after the deadline for Arnush's opposition to the summary judgment motions made by Cedars, and Drs. Johnson and Lauryssen had passed. Arnush was able to timely file Dr. Pratley's declaration in opposition to Dr. Rhoten's motion because the Rhoten summary judgment motion was filed after the other defendants'.

At a hearing on February 19, 2008 the trial court granted summary judgment in favor of Cedars, Dr. Lauryssen and Dr. Johnson. The court rejected Arnush's argument expert opinions must be based on personal knowledge, and found Cedars's, Dr. Lauryssen's and Dr. Johnson's experts' opinions were sufficient to establish those defendants had acted within the standard of care. The court further found there was no good cause for the late filing of Dr. Pratley's declaration and thus ruled it could not be used to demonstrate a triable issue of material fact.

Dr. Rhoten's motion for summary judgment was granted after a hearing on February 26, 2008. The trial court found Dr. Rhoten's expert's opinion was sufficient to satisfy Rhoten's initial burden of proof on the motion and Dr. Pratley's opinion failed to

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[3] Dr. Lauryssen included with the exhibits filed in support of his motion for summary judgment consent forms for the August 2004 surgery signed by Arnush on August 14 and August 16, 2004. Dr. Johnson's expert also referred to these consent forms in his declaration as the basis for his opinion Arnush had been adequately informed of the risks of the procedures and consented to the August 2004 surgery.

raise a triable issue of fact as to whether Dr. Rhoten's performance fell below the standard of care.

CONTENTIONS

Arnush contends summary judgment should not have been granted because defendants failed to introduce authenticated copies of Arnush's medical records into evidence and thus their experts' opinions lacked evidentiary support.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)[4] We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) However, "'[g]iven the difficulty of proving a negative,'" negating an element—that is, for "element X" proving "*not* X"—is an "'often impossibly high'" undertaking. (*Id.* at p. 854.)

As an alternative to the difficult task of negating an element, the defendant may present evidence to "'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (§ 437c, subd. (*o*)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 853.) A defendant "has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff *does not possess*

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4 Statutory references are to the Code of Civil Procedure.

needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff *cannot reasonably obtain* needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion [citation]." (*Aguilar,* at p. 854; *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 889-890, 891-892.) A defendant can satisfy its initial burden to show an absence of evidence through "admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing" (*Aguilar,* at p. 855), or through discovery responses that are factually devoid (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590; accord, *Cassady v. Morgan, Lewis & Bockius* (2006) 145 Cal.App.4th 220, 240.) Argument alone is insufficient. (*Aguilar,* at p. 855; see *id.* at p. 855, fn. 23 [defendant does not meet its burden on summary judgment "simply" by pointing out "'*absence of evidence* to support' an element of the plaintiff's cause of action . . . ."]; see *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.)

Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (§ 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 849.) On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *The Trial Court Improperly Granted Summary Judgment in Favor of the Defendants*

    a. *Defendants did not conclusively negate their conduct fell below the standard of care*

Expert opinion testimony is required in medical malpractice cases to prove or disprove whether the defendant performed in accordance with the prevailing standard of care except when "the negligence is obvious" to the layperson. (*Kelley v. Trunk* (1998)

66 Cal.App.4th 519, 523; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) Defendants contend their experts' opinions stating their performance did not fall below the standard of care was sufficient to shift the burden to Arnush to demonstrate a triable issue of material fact, which, they argue, Arnush failed to do.[5]

"[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based."

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5 Citing the recent case of *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, Arnush argues the expert declarations submitted in support of the motions were inadmissible in the absence of the medical records upon which the expert opinions were based. Defendants contend this argument has been forfeited because it was not raised in the trial court and assert, in any event, the holding in *Garibay* should not be applied to cases decided before that opinion was filed. We need not reach either issue. Although Arnush's challenge to the trial court's order granting summary judgment focused on the admissibility of the expert declarations, Cedars and Drs. Rhoten and Johnson in their briefs to this court and Dr. Lauryssen in a supplemental brief filed at the invitation of the court have argued that they presented sufficient evidence to satisfy their initial burden on a motion for summary judgment and that Arnush's responding papers failed to raise a triable issue of material fact. Because the parties have had an opportunity to fully brief this issue and in view of our obligation to review de novo the trial court's decision to grant the motion, we exercise our discretion to consider the adequacy of the moving parties' papers. (See *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 722, fn. 17, overruled on other grounds in *Edelstein v. City & County of San Francisco* (2002) 29 Cal.4th 164, 183 [whether to apply rule of forfeiture for failure to properly raise an issue "'is largely a question of the appellate court's discretion'"]; *Japan Line, Ltd. v. County of Los Angeles* (1977) 20 Cal.3d 180, 184-185, rev'd on other grounds (1979) 441 U.S. 434 [99 S.Ct. 1813, 60 L.Ed.2d 336] [appellate court may consider issue despite "obvious impropriety" in a party's appellate procedure provided the parties have had an opportunity to brief the question]; *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1341 & fn. 6 [in reviewing summary judgment in favor of defendant, Court of Appeal considered question not raised by plaintiff in the trial court or in his initial briefs on appeal; "[i]t makes no difference that this issue was first raised on appeal by the court rather than the parties, as long as the parties have been given a reasonable opportunity to address it"]; see generally *Saldana v. Globe-Weis Systems Co*. (1991) 233 Cal.App.3d 1505, 1513 ["[r]eview of a trial court's determination [on summary judgment] involves pure matters of law, requiring a reassessment of the legal significance of the documents"].)

(*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; accord, *Kelley v. Trunk, supra*, 66 Cal.App.4th at p. 524 ["opinion unsupported by reasons or explanations does not establish the absence of a material fact issue for trial, as required for summary judgment"].) Because we strictly scrutinize the moving party's evidence when summary judgment has been granted (*O'Riordan v. Federal Kemper Life Assurance Co., supra*, 36 Cal.4th at p. 284), a defendant must be particularly careful that expert declarations submitted in support of a motion for summary judgment are not merely conclusory assertions the defendant's conduct did not fall below the standard of care. (See *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 304 [defendants' expert's declaration too conclusory to shift burden; "[b]ecause summary judgment is a drastic measure that deprives the losing party of a trial on the merits, it may not be invoked unless it is clear from the declarations that there are no triable issues of material fact"].) In this case, defendants' experts' opinions lacked sufficient reasoned explanation to preclude a reasonable trier of fact from finding it was more likely than not their performance fell below the standard of care. (See *Kahn v. East Side Union High School Dist., supra*, 31 Cal.4th at p. 1003 ["defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true"]; cf. *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117-1118 ["expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury . . . to determine what occurred, but instead supplants the jury by declaring what occurred"], italics omitted.)

i. Cedars

In his complaint Arnush alleged Cedars's conduct fell below the standard of care "in that, among other things, [Cedars] negligently and carelessly failed to provide the necessary policies, supervisory procedures and qualified personnel to reasonably supervise the treatment provided by these staff physicians [Drs. Rhoten, Johnson and Lauryssen] to [Arnush]. [¶] . . . As a direct and proximate result of [Cedars's]

negligence and carelessness in supervising its co-defendants, [Arnush] was injured when the named co-defendants negligently and carelessly repaired the hardware in [Arnush's] back and, thereby, allowed an infection to spread in [Arnush's] body."

Cedars submitted an expert declaration from Dr. Paul D. Holtom, a physician board certified in internal medicine and infectious diseases, who opined, "[T]he treatment provided to [Arnush] by [Cedars] nurses and other personnel related to his post-operative infections and seroma met the standard of care"; Cedars personnel "did not breach the standard of care in treating [Arnush's] post-operative fevers and infections"; "treatment of [Arnush's] seroma also met the standard of care"; "there is no breach of the standard of care by [Cedars] personnel for any alleged failure to timely diagnose, and/or treat [Arnush's] post-operative fevers"; and Cedars "personnel's treatment of [Arnush] did not cause or contribute to the development of [Arnush's] post-operative fevers or the seroma. The development of the post-operative fevers and infections were not the result of any negligent treatment by" Cedars.

Holtom's opinion consists of virtually nothing more than these conclusions. There are no facts upon which Holtom's opinion is based, analysis or reasoning. Moreover, although exceedingly broad, the complaint essentially alleges Cedars negligently failed to supervise the doctors' repair of the hardware placed in Arnush's back thus leading to the development of infection and the failure of the hardware. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673 ["pleadings serve as the outer measure of materiality in a summary judgment proceeding"]; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 ["'function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings'"].)[6] Holtom fails to opine on or identify any experience he

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6 During Arnush's deposition it became clear he was also claiming Cedars was negligent by, among other things, failing to provide sufficient and adequate nursing care, resulting in his fall when nurses did not respond to his call for bathroom assistance, and failing to properly screen its blood supply allegedly resulting in Arnush contracting

has had with respect to the repair, replacement and/or failure of the kind of hardware in Arnush's spine, the relationship, if any, between the development of infection and the failure of hardware, or a hospital's supervisory responsibilities in connection with the performance of spinal surgery. It is hard to imagine an expert declaration more conclusory and deficient than Holtom's.

ii. Dr. Johnson

Dr. Johnson supported his motion for summary judgment with a declaration from Dr. Robert G. Watkins, III, a board certified orthopedic surgeon with an active spinal surgery practice. Before opining on Dr. Johnson's performance, Dr. Watkins set forth some of the chronology leading to the August 2004 surgery performed by Dr. Johnson and Dr. Lauryssen, as well as observations made by Dr. Johnson in an operative report he prepared. Dr. Watkins then opined, "the surgery performed on [Arnush] on August 17, 2004 by Dr. Johnson was emergently indicated. Essentially, Dr. Johnson was in a difficult situation where he had to perform a 'salvage surgery'"; "it is my expert opinion that [Dr. Johnson's] performance of the August 17, 2004 surgery on [Arnush] was appropriate and within the standard of care"; "it is my expert opinion that [Dr. Johnson] at all times complied with the standard of care with regard to his care and treatment of [Arnush]"; "it is my expert opinion that to a reasonable medical probability, there was no negligent act or omission to act on the part of [Dr. Johnson] that caused or contributed to [Arnush's] alleged injuries."

Hepatitis B and C. Although Cedars attempted to refute Arnush's claim of negligence in the provision of nursing services by submitting the declaration of a registered nurse, any such purported negligence was not alleged in the complaint and therefore cannot be a basis for liability at the summary judgment stage. (See *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648 [A "'plaintiff cannot bring up new, unpleaded issues in his or her opposing papers . . . .' [Citations.] A summary judgment . . . motion that is otherwise sufficient 'cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings . . . .' [Citation.] Thus, a plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing."].)

Although Dr. Watkins's declaration is somewhat better than Dr. Holtom's in that it sets forth some facts upon which Dr. Watkins's opinion is based, simply reciting facts from the medical records without any analysis or reasoning in support of the ultimate conclusion of no negligence will not carry the moving defendant's burden to negate an essential element of a medical malpractice claim.

iii. Dr. Lauryssen

Dr. Lauryssen supported his motion for summary judgment with a declaration from Dr. Duncan Quincy McBride, a board certified neurosurgeon with a subspecialty in spine. After setting forth the facts from Arnush's medical records that form the basis of his opinion, including information from Arnush's subsequent treatment by Dr. Delamarter, Dr. McBride opined Dr. Lauryssen's decision to remove and replace the infected hardware in Arnush's back and extend the hardware above the infected area in an attempt to further stabilize his spine was within the standard of care. With respect to the performance of the surgery itself, Dr. McBride opined, "Failed bony fusion is a standard risk of any spinal fusion and nothing Dr. Lauryssen did or failed to do caused or contributed to [Arnush's] failed fusion at T11-L1. The original levels L1-L5 fused well."

Although Dr. McBride's opinion does contain some analysis and reasoning as to why Dr. Lauryssen's decisions about the scope and particulars of the surgery he chose to perform were sound, it fails to include any reasoning or analysis addressing whether his performance of the surgery met the standard of care and did not cause the failure of the hardware he and Dr. Johnson had extended to T11 and T12. Merely because a complication or unfavorable outcome is a risk of surgery does not preclude the possibility that negligence led to the complication arising. Dr. McBride should have addressed questions such as whether the kind of failure Arnush experienced is typical of the failure that is a standard risk of the surgery, the percentage of people who have had failed fusions similar to Arnush's, whether—in light of Arnush's allegations linking the occurrence of infection with the failure—failure occurs in absence of infection. Moreover, with respect to the eradication of any existing infection or development of new infection, Dr. McBride includes only a conclusory assertion that "Dr. Lauryssen took all

reasonable steps to clean the infection that was already present in [Arnush's] spine and to prevent any further infection." To be sure, Dr. McBride also opines it is unlikely after the August 17, 2004 Arnush "suffered from an infection since his white blood cell counts were relatively normal within ten days post-operatively and his white blood cell counts should have remained elevated if there was any post-operative infection." However, Dr. McBride fails to address whether a single relatively normal white blood cell count 10 days post-operatively precludes the possibility Arnush developed osteomyelitis as a result of negligence by Dr. Lauryssen.

iv. Dr. Rhoten

Dr. Rhoten supported his motion for summary judgment with a declaration from Dr. Jeffrey Wang, a board certified orthopedic surgeon, who opined after reciting some facts from Arnush's medical records, "Dr. Rhoten's care and treatment of Mr. Arnush during the first admission at [Cedars] (June 21-July 16, 2004) was appropriate, and within the standard of care. This included performance of surgeries on June 21 and June 24, 2004. The seroma that developed is a recognized complication of surgery. The fall on July 10, 2004 that dislodged the cage, was an event that could not have been reasonably anticipated by Dr. Rhoten, who was apparently not present at that time. Mr. Arnush was seen by multiple specialists. His condition stabilized, and he was appropriately discharged to home on July 16, 2004. Dr. Rhoten's care and treatment of Mr. Arnush also was appropriate for the July 18, 2004-September 10, 2004 [Cedars] admission. As noted earlier, many specialists were called in for consultation. Infection is a recognized complication of surgery, and there can never be any guarantee of absolute success of the surgeries performed by Dr. Rhoten on Mr. Arnush. Finally, Dr. Rhoten's care of Mr. Arnush after discharge from Cedars Sinai—until he transferred his care to another surgeon—was appropriate as far as the evaluation and treatment received. [¶] . . . All in all, it is my opinion, based on my education, training, experience, review of medical records, that Dr. Rhoten was within the standard of care at all times. Spine surgery, such as Mr. Arnush underwent, can have complications, particularly when there is seroma and infection—regardless of the expertise and neurosurgical care provided. I

am further of the opinion that nothing done or not done by Dr. Rhoten was a cause of injury to Mr. Arnush, as none of the complications were due to Dr. Rhoten's medical care."

While seroma and infection may be recognized complications of spinal surgery, like Dr. Watkins's conclusory assertion "[f]ailed bony fusion is a standard risk of any spinal fusion," whether seroma and infection are known complications begs the question whether Arnush's seroma and infections were unrelated to any negligence by Dr. Rhoten. Moreover, while it is correct Dr. Rhoten could not have anticipated Arnush would fall, thus necessitating the third surgery, the question is nevertheless whether the performance of that surgery (or the two prior surgeries) was within the standard of care. Dr. Rhoten does not dispute the hardware he had installed failed and Arnush had infection on both sides of his spine, as discovered by Drs. Lauryssen and Johnson during performance of the August 2004 surgery. Dr. Rhoten was required to establish, however, that such failure and infection were not due to his own performance failing to meet the standard of care by more than just conclusory assertions from his expert.

3. *Defendants Failed to Establish Arnush Did Not Possess or Could Not Reasonably Obtain Evidence Establishing His Claims*

In addition to failing to conclusively negate the element of breach (failure to perform at the required standard of care), defendants failed to demonstrate Arnush did not have or could not reasonably obtain evidence to support his claims. Indeed, Arnush submitted an expert declaration stating the defendants' performance fell below the standard of care. (Whether the declaration was deficient, as defendants contend, is relevant to whether Arnush established a triable issue of fact if the initial burden on the summary judgment motions had shifted, not to whether defendants met their initial burden.) Moreover, Arnush testified at his deposition that Dr. Delamarter, who performed Arnush's final surgery, was critical of the prior surgeries; and Dr. Delamarter, along with a number of other of Arnush's treating physicians, were identified in Arnush's response to defendants' demand for exchange of expert witness information. The record thus falls far short of demonstrating "the plaintiff 'has not established, and cannot

reasonably expect to establish'" one of the elements of his cause of action. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460; accord, *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713,720.)

DISPOSITION

The judgment is reversed and remanded. Arnush is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.